

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
SOUTHERN DIVISION

FREESHONE C. MCLEOD, #229 466,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO. 1:17-CV-351-WKW
	)	[WO]
STATE OF ALABAMA, <i>et al.</i> ,	)	
	)	
Defendants.	)	

**RECOMMENDATION OF THE MAGISTRATE JUDGE**

This civil action is filed by Plaintiff Freeshone McLeod, an indigent state inmate incarcerated at the Easterling Correctional Facility in Clio, Alabama. He seeks to challenge the sufficiency of the evidence entered against him in the Circuit Court of Houston County, Alabama, which led to his convictions for rape and attempted murder in 2003.<sup>1</sup>

Under 28 U.S.C. § 1915, a prisoner may not bring a civil action or proceed on appeal *in forma pauperis* if he “has, on 3 or more occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.”<sup>2</sup> 28 U.S.C. § 1915(g).

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<sup>1</sup> McLeod filed a petition for habeas corpus relief in which he challenged the constitutionality of his rape and attempted murder convictions. *McLeod v. Holt, et al.*, Case No. 1:05-CV-1123-MEF (M.D. Ala. 2007). In this prior habeas action, the court denied McLeod relief from his convictions.

<sup>2</sup> In *Rivera v. Allin*, 144 F.3d 719, 731 (1998), the Court determined that the “three strikes” provision of 28 U.S.C. § 1915(g), which requires frequent filer prisoner indigents to prepay the entire filing fee before federal courts may consider their cases and appeals, “does not violate the First Amendment right to access the courts; the separation of judicial and legislative powers; the Fifth Amendment right to due process of law; or the Fourteenth Amendment right to equal protection, as incorporated through the Fifth Amendment.” In *Jones v. Bock*, 549 U.S. 199, 216 (2007), the Supreme Court abrogated *Rivera* but only to the extent it compelled an inmate to plead exhaustion of remedies in his complaint as “failure to exhaust is

## I. DISCUSSION

Upon initiating this case, McLeod filed a motion for leave to proceed *in forma pauperis*. Doc. 2. Under the directives of 28 U.S.C. § 1915(g), however, a prisoner may not bring a civil action or proceed on appeal *in forma pauperis* if he “has, on 3 or more occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.” Consequently, an inmate in violation of the “three strikes” provision of § 1915(g) who is not in “imminent danger” of suffering a serious physical injury must pay the filing fee upon initiation of his case. *Dupree v. Palmer*, 284 F.3d 1234, 1236 (11th Cir. 2002).

Court records establish that McLeod, while incarcerated or detained, has on at least three occasions had civil actions and/or appeals dismissed as frivolous, as malicious, for failure to state a claim and/or for asserting claims against defendants immune from suit under 28 U.S.C. § 1915. The cases on which the court relies in finding a violation of § 1915(g) are: (1) *McLeod v. Valeska*, Case No. 1:03-CV-495-WHA (M.D. Ala. 2003); (2) *McLeod v. Valenza*, Case No. 1:03-CV-16-MHT (M.D. Ala. 2003); and (3) *McLeod v. Valenza*, Case No. 1:02-CV-995-MEF (M.D. Ala. 2003). This court therefore concludes that the afore-mentioned summary dismissals place Plaintiff in violation of 28 U.S.C. § 1915(g).

In the present cause of action, McLeod challenges the constitutionality of criminal convictions entered against him in 2003 by the Circuit Court of Houston County, Alabama. The allegations made the basis of the instant complaint fail to demonstrate that McLeod was “under

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an affirmative defense under the PLRA ... and inmates are not required to specifically plead or demonstrate exhaustion in their complaints.”

imminent danger of serious physical injury” at the time he filed this cause of action as is required to meet the imminent danger exception to the application of 28 U.S.C. § 1915(g). *Medberry v. Butler*, 185 F.3d 1189, 1193 (11th Cir. 1999) (A prisoner who has filed three or more frivolous lawsuits and seeks to proceed *in forma pauperis* must allege a present “imminent danger” to circumvent application of the “three strikes” provision of 28 U.S.C. § 1915(g).); *Lewis v. Sullivan*, 279 F.3d 526, 531 (7th Cir. 2002) (The imminent danger exception is available only “[w]hen a threat or prison condition is real and proximate, and when the potential consequence is serious physical injury.”) (internal quotations omitted). The court therefore concludes this case is due to be summarily dismissed without prejudice as McLeod failed to pay the requisite filing and administrative fees upon filing suit. *Dupree*, 284 F.3d at 1236 (emphasis in original) (“[T]he proper procedure is for the district court to dismiss the complaint without prejudice when [an inmate is not entitled] to proceed *in forma pauperis* [due] to [violation of] the provisions of § 1915(g)” because the prisoner “must pay the filing fee at the time he *initiates* the suit.”); *Vanderberg v. Donaldson*, 259 F.3d 1321, 1324 (11th Cir. 2001) (same).

## II. CONCLUSION

Accordingly, it is the RECOMMENDATION of the Magistrate Judge that:

1. Plaintiff’s motion for leave to proceed *in forma pauperis* (Doc. 2), be DENIED;
2. This case be DISMISSED without prejudice for Plaintiff’s failure to pay the filing and administrative fees upon his initiation of this case.

It is further

ORDERED that **on or before June 19, 2017**, Plaintiff may file an objection to the Recommendation. Any objection filed must specifically identify the factual findings and legal conclusions in the Magistrate Judge’s Recommendation to which Plaintiff objects. Frivolous,

conclusive or general objections will not be considered by the District Court. This Recommendation is not a final order and, therefore, it is not appealable.

Failure to file a written objection to the proposed findings and recommendations in the Magistrate Judge's report shall bar a party from a *de novo* determination by the District Court of factual findings and legal issues covered in the report and shall "waive the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions" except upon grounds of plain error if necessary in the interests of justice. 11th Cir. R. 3-1; *see Resolution Trust Co. v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993); *Henley v. Johnson*, 885 F.2d 790, 794 (11th Cir. 1989).

Done, this 5th day of June 2017.

/s/ Wallace Capel, Jr.  
CHIEF UNITED STATES MAGISTRATE JUDGE